R. V. RAJU & ORS. v. R.

[A. Cr. J. (Spenser Wilkinson, J.) November 28, 1952]

[Penang — Criminal Appeal No. 41 of 1952]

Evidence — Evidence of similar facts — When admissible.

This appeal raises an important point as to the principles which should guide the Court in admitting evidence of similar facts.

The 1st and 2nd appellants appealed against their conviction in the lower Court on two charges of corruption and the 3rd appellant against his conviction of abetting these offences. There was no evidence that the first two appellants received the sums of money as charged. There was some evidence that the 3rd appellant received the moneys but no evidence that he passed them to the first two appellants. However evidence was admitted that on different occasions certain persons had paid money to the 2nd appellant. The learned President considered these similar facts as relevant and admissible because they showed system.

Held: (1) evidence of similar facts prejudicial to the accused should not be admitted without reasonable cause. If it is admissible, it should be admitted for a specific purpose and not merely because it shows system. That purpose may be to negative accident, or to prove identity or to prove intention, or to rebut a defence which would otherwise be open to the accused. It is therefore of the greatest importance when evidence of similar facts is tendered that the prosecution should tender it for a specific purpose. It is then for the Court, as a rule of judicial practice, to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted; (2) in this case, evidence that the 2nd appellant had received sums of money on different occasions was only properly admissible if it could first be shown that he did in fact receive the sums of money as charged. Then evidence of similar facts might have been admissible to show that the sums he received as charged were received with a corrupt intention, or to rebut the defence that the sums were received for an innocent purpose.

[Editorial Note: The doubts raised by R. v. Sims (1946) 1 K.B. 531; (1946) 1 All E.R. 697 on the question of whether any evidence which is logically probative is admissible irrespective of the issues raised by the defence unless excluded are dispelled by the judgment of Lord Simon in Harris v. Director of Public Prosecutors(1) cited herein.]

Cases referred to:—

(1) *Harris v. Director of Public Prosecutions* 36 Cr. App. R. 39 at 54; (1952) 1 All E.R. 1044; (1952) W.N. 202.

(2) *Makin v. Attorney-General for New South Wales* (1894) A.C. 57.

(3) *Noor Mohamed v. R.* (1949) A.C. 182; (1949) 1 All E.R. 365.

(4) *R. v. Straffen* (1952) 2 All E.R. 657; (1952) W.N. 441.

(5) *X. v. Public Prosecutor* (1951) M.L.J. 10; CRIMINAL APPEAL.

Jag-Jit Singh for the 1st and the 2nd appellants.

E. A. de Buriatte for the 3rd appellant.

C. M. Sheridan (D.P.P.) for the Crown.

Cur. Adv. Vult.

Spenser Wilkinson, J. : — The first two appellants were jointly charged before the President, Sessions Court at Kulim on three charges of corruption and the 3rd appellant was charged and tried at the same time with abetment of each of the offences committed by the first two appellants. All three appellants were acquitted on the 1st Charge and therefore this appeal only concerns the other two Charges.

Put shortly, the 2nd Charge against the first two appellants was that in Division 5 of the Dublin Estate they corruptly accepted a sum of $18 from one Athiaya as an inducement for obtaining ration cards for Athiaya and two others. Athiaya, who was the 13th Prosecution Witness, gave evidence to the effect that the 3rd appellant demanded from him $6 for each ration card issued and as he was drawing cards for himself, his wife and mother-in-law he paid a sum of $18 to the 3rd appellant. No evidence was given by Athiaya or any other witness that either of the first two appellants received the sum of $18 or any other sum from Athiaya.

The 3rd Charge against the first two appellants was similar being in respect of their acceptance of $18 from one Salleh bin Ayob in Division 8A of the same Estate. Salleh bin Ayob was the 21st Prosecution Witness and his evidence also was that he gave $18 to the 3rd appellant in respect of three ration cards. He also gave no evidence that either of the first two appellants accepted any money from him.

There was some evidence that the first two appellants were present when the 3rd appellant received the abovementioned sums from Athiaya and Salleh, but no evidence whatsoever that the 3rd appellant passed these or any other sums to the first two appellants. The two witnesses upon whom the learned President particularly relied gave evidence that the 2nd appellant demanded money, but no evidence that he received it. It is possible that this evidence of presence and assistance would have been sufficient, with such inferences as might have been drawn therefrom, to raise a case of abetment by the 2nd appellant of the corrupt receipt of money by the 3rd appellant; but there was no such evidence against the 1st appellant and in any case the first two appellants were not charged with abetment but as principals. On the face of the evidence of Athiaya and Salleh the prosecution had framed their charges the wrong way round, and no attempt was made to amend them.

The learned Deputy Public Prosecutor informed

convictions in respect of these two appellants, because, apart from some dubious evidence of system, there was no evidence that these appellants received any money.

The question then arose whether there was anything in this so-called evidence of "system" which could assist the prosecution. The evidence in question consisted of that of various witnesses to the effect that at different Divisions of the same Estate on different occasions certain persons paid money to the 2nd appellant in order to obtain ration cards. In his Grounds of Decision the learned President referred to this evidence as follows :—

"The evidence of several prosecution witnesses referred to divisions not the subject matter of any charge: it was evidence which I considered to be clearly relevant to show system."

It is not clear to me precisely what the learned President meant by the expression "relevant to show system". The law on the subject of the admissibility or otherwise of similar acts committed by an accused person is perhaps one of the most difficult branches of the law of evidence. One thing, however, appears to me to emerge very clearly from all the decided cases on this subject, and that is that what is often referred to as evidence of "system" (a phrase which I deprecate as being somewhat misleading) when it is admissible at all is admissible for specific purposes and for those purposes only and not, as suggested in this case by the learned President simply because it shows system. In this country such evidence of similar acts is often admissible under section 15 of the Evidence Ordinance, though certain types of evidence of similar offences or acts may be admissible under sections 14 and 11. Generally speaking the evidence of similar facts may be relevant for the following purposes, though this list may not be exhaustive :—

1. To negative accident;
2. To prove identity;
3. Where **mens rea** is the gist of the offence, to prove intention; and
4. To rebut a defence which would otherwise be open to the accused.

In my opinon it is of the greatest importance when evidence of this kind is tendered that the prosecution should tender it for a specific purpose and that, if it is admitted, it should be made quite clear for what purpose it is admitted. In his opinion in the case of *Harris v. Director of Public Prosecutions*[1] Lord Simon says :—

"What Lord Sumner meant in **Thompson v. Director of Public Prosecutions** when he denied the right of the prosecution to 'credit the accused with fancy defences' was that evidence of similar facts involving the accused ought not to be dragged in to his prejudice without reasonable cause."

He then goes on as follows :—

"There is a second proposition which ought to be added under this head. It is not a rule of law governing the admissibility of evidence, but a rule of judicial practice followed by a judge who is trying a charge of crime when he thinks that the application of the practice is called for. Lord du Parcq referred to it in **Noor Mohamed's case** immediately after the passage above quoted, when he said (at p. 192): '.....in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge.'"

Although these passages no doubt refer primarily to a trial by Judge and Jury the principle that evidence of similar facts involving the accused ought not to be dragged in to his prejudice without reasonable cause remains one which should be borne in mind in all Courts. As in the High Court so in the Subordinate Courts cases may occur (though perhaps not so frequently as with a jury) in which it would be unjust to admit highly prejudicial evidence simply because it is technically admissible. And it is only when the purpose to which such evidence is professedly directed is known that the question can be decided whether or not it would be unjust in all the circumstances to admit such evidence. Moreover in a later part of his opinion in the case above cited Lord Simon states quite categorically and generally that evidence of similar facts should be excluded unless such evidence has a really material bearing in the issues to be decided. (36 Cr. App. R. at p. 58).

In the present case it looks as though the evidence had been admitted and used to help to prove that the 2nd appellant had actually received the sums of $18 from Athiaya and Salleh respectively as charged. It must be pointed out, however, that even if it had been proved conclusively that the 2nd appellant had received sums of money in respect of ration cards from a large number of other persons on different dates and in different places this would not prove that he had in fact received the sums referred to in the Charges from the particular persons and at the particular times alleged. As regards actual receipt of moneys it might prove that the 2nd appellant was in the habit of receiving such sums and was therefore the sort of person who was likely to have received the sums in question. It has been held time and time again that evidence of this kind is not admissible for this purpose. If the 2nd appellant had been charged with abetment by conspiracy it might have been material evidence in support of the conspiracy, but he was not so charged. If admissible at all upon the matters actually charged in this trial this evidence would have been admissible,

after proof *aliunde* of the facts charged, either to show that the sums received as alleged in the Charge were received with a corrupt motive, or to rebut the defence that the sums were received for an innocent purpose. As, however, there was no evidence *aliunde* that the sums charged were ever received the evidence about other sums received on other occasions should have been ignored. I do not think it is necessary for me to refer in any detail to all the authorities on the subject. I will confine myself to saying that in expressing the views given above I have been guided by the decisions of the House of Lords and the Privy Council in the cases of *Makin v. Attorney-General for New South Wales*[2], *Harris v. Director of Public Prosecutions*[1] and *Noor Mohamed v. Rex*[3] the decision of the Court of Criminal Appeal in *Rex v. Straffen*[4] and the decision of the Court of Appeal in *X. v. Public Prosecutor*[5].

In my opinion there was no evidence before the Sessions Court that the first two appellants committed the offences charged, and I therefore quashed both their convictions.

The 3rd appellant having been charged with abetment of offences by the first two appellants which they never committed, it was clear that in the circumstances of this case his convictions could not stand. As, for the reasons given hereafter, I could not alter the charge, the only question I had to decide, therefore, with regard to this appellant was whether or not there should be a retrial.

This brings me to a very unfortunate aspect of this case. A considerable body of evidence was given at the hearing which went to suggest that the Senior Conductor and the Junior Conductor were the persons mainly responsible for this unauthorised collection of $6 per ration card from the labourers and that the 3rd appellant, who was a clerk on the Estate, was to some extent acting on their instructions. In his Grounds of Decision the learned President says: "I agree with both learned Defence Counsel that on the evidence before the Court many of the senior estate conductors should also have been on trial". I find it a little difficult to believe that no hint of this appeared anywhere in the statements taken from the witnesses in the Police investigation and in my opinion the question of why these Conductors were not prosecuted along with the other appellants is one which the appropriate authorities would do well to investigate. The Junior Conductor was called as a witness by the prosecution but the Senior Conductor was not only not called but was allowed to proceed to India before the trial for the purpose of getting married. The Investigating Officer, who was the 1st Prosecution Witness and who apparently also conducted the prosecution, was by leave of the Court recalled towards the end of the prosecution case and admitted that before the case came on for trial he had told Counsel that he was not going to subpoena the Senior Conductor Madhu Pillay. The learned President appears to have taken a sufficiently serious view of this aspect of the matter to ask at the close of the case for the prosecution that another Prosecutor Officer be provided.

Whether or not it be a fact that the 3rd appellant was to some extent acting under orders when he received this money there is evidence on the record which might lead to the conclusion that he committed some offence. The learned President in his Grounds of Judgment discussed the question of whether a more appropriate charge against this appellant would not have been cheating but he referred to this as a purely technical point. He did not, as I think he might have done, alter the charge either to one of accepting bribes or to one of cheating and give the appellant the opportunity of recalling any witnesses. For this reason it was clearly impossible for me to alter the charge and record a conviction upon such altered charge. I considered therefore whether my best course would be simply to quash the conviction on the charge of corruption and leave the prosecution to take such steps as they might be advised with regard to fresh proceedings against the 3rd appellant for cheating or such other offence as they thought proper. The learned Deputy Public Prosecutor, however, urged upon me that there might be difficulties in the way of the prosecution if I did this, and that a plea of *autrefois acquit* might be raised. For this reason, upon an undertaking given by the learned Deputy Public Prosecutor that all those found to be concerned would, in fact, be prosecuted along with this appellant I set aside the conviction and sentence and ordered a retrial. Under this form of order it will be open to the prosecution not to proceed further against this appellant, if after further investigation they come to the conclusion that justice would be served by prosecuting others without joining him. This is a matter entirely in the discretion of the Public Prosecutor.

Convictions of 1st & 2nd appellants quashed. Retrial of 3rd appellant ordered.

DAIMON BIN BANDA v. PUBLIC PROSECUTOR.

[C. A. (Foster Sutton, C.J., Thomson and Wilson, JJ.) Kuala Lumpur, May 15, 1951]

Prevention of Corruption Ordinance, 1950, s. 13(1) and (3) — Evidence Ordinance, s. 114 — Effect of s. 13(1) of the Prevention of Corruption Ordinance, 1950